STATE OF MICHIGAN

COURT OF APPEALS

FORD MOTOR CREDIT COMPANY, Plaintiff/Counter defendant-Appellant,	UNPUBLISHED August 2, 2007
v	No. 266770 Genesee Circuit Court
DARRON ODOM and ANTOINETTE BROWN, Defendants/Counter plaintiffs-Appellees.	LC No. 04-078874-CZ

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Plaintiff/counter defendant, Ford Motor Credit Company (FMCC), appeals as of right the trial court's November 17, 2005, judgment in favor of defendants/counter plaintiffs, Darron Odom and Antoinette Brown, which included an award of attorney fees and costs. On appeal, FMCC also takes issue with the trial court's previously entered July 26, 2004, order granting Odom and Brown's motion for summary disposition of FMCC's complaint, and denying FMCC's motion for summary disposition of Odom and Brown's counter-complaint. FMCC also challenges the trial court's September 13, 2005, order denying its motion to set aside the default judgment.

We affirm the trial court's July 26, 2004, order to the extent it denied FMCC's motion for summary disposition on Odom and Brown's Fair Credit Reporting Act (FCRA) claim, but reverse the trial court's order to the extent that it denied FMCC's motion for summary disposition on Odom and Brown's Michigan Consumer Protection Act (MCPA) claim. We also reverse that order to the extent it granted summary disposition in favor of Odom and Brown on FMCC's complaint. We additionally hold that the trial court abused its discretion when it entered a default against FMCC and subsequently denied FMCC's motion to set aside the default. Furthermore, given that the jury's verdict was based on the liability imposed by the default, and the trial court's award of attorney fees was based on the jury verdict that FMCC violated the FCRA, we vacate the November 17, 2005, final judgment in its entirety and remand to the trial court for further proceedings consistent with this opinion.

I. Background

Odom and Brown purchased a used 2001 Pontiac Grand Am from Expressway Ford pursuant to a retail installment sales contract (RISC). Odom and Brown were to make 60 monthly payments of $417.58 to FMCC with the first payment being due on February 17, 2002. On October 24, 2002, Odom and Brown filed a lawsuit against Expressway, FMCC and three other defendants. In that lawsuit they sought revocation of the RISC and damages for breach of warranty, alleging that Expressway knowingly sold them a vehicle that had previously been deemed a total loss and whose odometer had been rolled back, without disclosing such facts to Odom and Brown (lawsuit one). Odom and Brown continued to make payments on the RISC for the duration of lawsuit one.

Before lawsuit one was tried, Odom, Brown and FMCC all accepted the case evaluation that FMCC pay Odom and Brown $1,000, and a stipulation and order of dismissal of Odom and Brown's claims against FMCC was entered on March 24, 2004.[1] Shortly thereafter, Odom and Brown ceased payments on the RISC, but maintained possession of the vehicle. FMCC reported Odom and Brown to various credit reporting agencies for failing to make their RISC payments.

On April 27, 2004, FMCC commenced the instant case by filing a complaint alleging that Odom and Brown breached the RISC when they stopped making payments and willfully refused to return the vehicle to FMCC. FMCC requested that the court direct Odom and Brown to surrender possession of the vehicle to FMCC and award FMCC damages for the depreciation of the vehicle during the time period where Odom and Brown refused to surrender possession of the vehicle. In the alternative, FMCC requested that the court issue an order awarding FMCC the remainder of the RISC balance ($12,407.30).

Odom and Brown filed a motion for summary disposition, asking that the trial court dismiss FMCC's complaint for lack of standing, or because it was barred by res judicata. Additionally, Odom and Brown filed a counter-complaint against FMCC alleging that FMCC violated the MCPA and FCRA when it reported the alleged unpaid RISC balance to credit reporting agencies. On June 25, 2004, FMCC filed a motion for summary disposition of Odom and Brown's counter-complaint, arguing that the trial court should dismiss Odom and Brown's counter-complaint because it was based on the false assumption that the RISC was revoked and that FMCC had no right to report Odom and Brown's unpaid RISC balance to credit reporting agencies.

Based on its finding that FMCC lacked standing to bring suit because it had assigned the RISC to a third party, the trial court granted Odom and Brown's motion for summary disposition of FMCC's complaint. The court denied FMCC's motion for summary disposition on the basis that Odom and Brown's counter-complaint was not barred by res judicata because the claims were not ripe during lawsuit one.

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[1] The case continued forward against the other parties.

Odom and Brown subsequently filed an application for entry of default against FMCC for failing to file an answer to their counter-complaint, which the trial court entered. FMCC promptly filed a motion to set aside the default, arguing that although it failed to file an answer to Odom and Brown's counter-complaint until September 9, 2005, "it otherwise defended" against the counter-complaint before it filed its late answer. The trial court denied FMCC's motion to set aside the default, holding that although "an affidavit of facts showing a meritorious defense has been filed," FMCC did not establish "good cause for failing to respond to – or to file an answer after the summary disposition motion was denied."

Because of the default FMCC was deemed to have admitted liability, and the trial focused on damages. After hearing evidence on damages and being instructed that it "must accept it as a fact that [FMCC], willfully, maliciously and intentionally violated the [FCRA] each time it made a report on the credit histories of [Odom and Brown]," and that FMCC "engaged in unfair and deceptive practices in violation of the [MCPA,]" the jury returned a verdict awarding Odom and Brown $250 each under the MCPA, and $500 each under the FCRA. In the trial court's final judgment entered on November 17, 2005, the trial court awarded Odom and Brown $15,085 for attorney fees and costs. In addition to awarding those attorney fees, the trial court reiterated that it was awarding Odom and Brown a total of $1,502 for FMCC's default violations of the FCRA and MCPA. FMCC appeals as of right.

II. Standard of Review

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Likewise, the determinations whether a party has standing, and the applicability of res judicata, are questions of law subject to de novo review. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004); *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998).

This Court reviews a trial court's decision to enter a default, and a trial court's decision on a motion to set aside a default, for an abuse of discretion. *Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A court's award of attorney fees is also reviewed for an abuse of discretion, but any questions of law that affect the determination of the attorney fees are reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

III. Analysis

A. July 26, 2004, order

i. FMCC's Complaint

The trial court dismissed FMCC's complaint based on its finding that FMCC was not the real party in interest to seek the unpaid RISC balance because it had already sold its RISC rights to another, unnamed party. "An action must be prosecuted in the name of the real party in interest." MCR 2.201(B). "A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another." *MOSES, Inc v Southeast Michigan Council of Governments*, 270 Mich App 401, 415; 716 NW2d 278 (2006). The real

party in interest rule is a "standing doctrine [which] recognizes that litigation should be begun only by a party having an interest that will ensure sincere and vigorous advocacy." *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989).

Odom and Brown argue that FMCC had no real legal interest in this controversy because it sold its rights in the RISC, and therefore did not suffer an injury when Odom and Brown failed to continue making their RISC payments. FMCC does not dispute the fact that it sold its RISC interest to an unnamed party.[2] Rather, FMCC argues that it still has standing because, pursuant to its agreement with the unnamed party, it was assigned the unnamed party's rights to its receivables in the event that FMCC needed to bring suit to collect any unpaid balance. The servicing agreement grants FMCC this specific right:

> Section 3.1 Duties of Servicer. . . . If the Servicer commences a legal proceeding to enforce a Receivable, the Purchaser . . . will, if necessary to effect the purpose of this agreement, thereupon be deemed to have automatically assigned such receivable to the Servicer.

Although FMCC's brief on appeal fails to provide *any* authority to support its position that its servicing agreement makes it a real party in interest, we note that our Supreme Court has held that an assignee of a contract may sue in its own name as a real party in interest where satisfaction of judgment will discharge the defendant from obligation to the assignor. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 582; 66 NW2d 230 (1954). Our Supreme Court's holding in *Kearns*, is consistent with MCR 2.201(B), which provides:

> An action must be prosecuted in the name of the real party in interest, subject to the following provisions
>
> (1) A personal representative, guardian, conservator, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a person authorized by statute *may sue in his or her own name without joining the party for whose benefit the action is brought*. [Emphasis added.]

Here, the servicing agreement automatically assigns to FMCC the unnamed party's rights to its receivables in the event that FMCC brings suit to collect any unpaid balance. Thus, for the purpose of enforcing the alleged loan obligation, FMCC, as the loan servicer, becomes the holder and owner of the alleged debt. Furthermore, because the unnamed party assigned its receivable rights to FMCC, a judgment obtained by FMCC would discharge Odom and Brown from any obligation to the assignor (the unnamed party), and defendants would not face a multiplicity of suits over this alleged debt. We therefore conclude that the trial court erred when it ruled that FMCC was not a real party in interest. MCR 2.201(B)(1); *Kearns*, *supra* at 582; See also *Greer v O'Dell*, 305 F3d 1297, 1299 (CA 11, 2002) (holding that "a loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services.") Accordingly, we vacate that portion of the July 26, 2004,

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[2] At oral argument the purchaser was noted to be Bear Stearns.

order granting summary disposition in favor of Odom and Brown on FMCC's complaint, and remand this matter to the trial court to address the merits of FMCC's complaint.[3]

ii. Odom and Brown's Counter-Complaint

FMCC also challenges the trial court's holding that Odom and Brown's counter-complaint was not barred by res judicata because their claims under the MCPA and FCRA were not ripe during lawsuit one.

MCPA Claim

As previously discussed, the parties agreed in lawsuit one to the case evaluation award of $1,000 to Odom and Brown, which led to a stipulation and order of dismissal of Odom and Brown's breach of warranty and revocation of acceptance claims against FMCC. Acceptance of a case evaluation is the equivalent of a consent judgment, which operates as a release. MCR 2.403(M); *Felsner v McDonald Rent-A-Car*, 193 Mich App 565, 570; 484 NW2d 408 (1992). Res judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials. *Staple v Staple*, 241 Mich App 562, 572; 616 NW2d 219 (2000). For res judicata to apply, a party must establish that the former suit was decided on the merits, the issues in the second action were or could have been resolved in the former action, and both actions involved the same parties or their privies. *Rogers, supra* at 551. Accordingly, res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining the subject matter of the litigation. *Jones v State Farm Mutual Automobile Insurance Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). Res judicata also bars claims arising out of the same transaction that the plaintiff could have brought but did not. *Id*.

Odom and Brown's claim that FMCC violated subsection 3(1)(m),[4] (n),[5] (s),[6] (u),[7] (bb)[8] and (cc)[9] of the MCPA, MCL 445.901 et seq, was brought in lawsuit one and was resolved when

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[3] Appellate review is typically limited to issues decided by the trial court, *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994), so even though FMCC has briefed whether the trial court should have granted it summary disposition on its complaint, we decline to address that issue.

[4] A party shall not cause "a probability of confusion or of misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction." MCL 445.903(1)(m).

[5] A party shall not cause "a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction." MCL 445.903(1)(n).

[6] A party shall not fail "to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer." MCL 445.903(1)(s).

[7] In "a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, [a party shall not fail] to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed

(continued…)

the parties accepted the case evaluation award. Given that Odom and Brown's MCPA claim in their counter complaint involved the same parties and arose out of the same RISC, we conclude that Odom and Brown's MCPA claim was barred by res judicata. *Staple, supra* at 572; *Jones, supra* at 401; *Felsner, supra* at 570; *Rogers, supra* at 551. Accordingly, the trial court erred when it denied FMCC's motion for summary disposition in regard to Odom and Brown's MCPA claim.

FCRA Claim

Odom and Brown's claim under the FCRA is not on the same footing. As noted, Odom and Brown remained current on their RISC payments throughout lawsuit one. Indeed, Odom and Brown did not default on their payments until after the aforementioned stipulation and order of dismissal had been entered. Accordingly, FMCC did not report Odom and Brown to credit reporting agencies, and subsequently file suit against Odom and Brown for breach of contract, until after Odom and Brown's claims against FMCC had been dismissed from lawsuit one. Therefore, Odom and Brown's counter-complaint claim that FMCC violated the FCRA could not have been resolved in lawsuit one despite the fact that the claim involved the same parties and arose out of the same RISC. The trial court therefore properly held that Odom and Brown's FCRA claim was not barred by res judicata. *Rogers, supra* at 551.[10]

Furthermore, although it is undisputed that Odom and Brown ceased payments on the RISC, we find that there are genuine issues of material fact regarding whether the RISC was properly revoked, and whether FMCC violated the FCRA when it reported Odom and Brown's alleged unpaid RISC balance to various credit reporting agencies. Therefore, we conclude that the trial court did not err when it denied FMCC's motion for summary disposition in regard to Odom and Brown's FCRA claim.

Under the FCRA, 15 USC § 1681 et seq, FMCC is prohibited from:

(A) Reporting information with actual knowledge of errors

(…continued)

value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest." MCL 445.903(1)(u).

[8] A party shall not make "a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." MCL 445.903(1)(bb).

[9] A party shall not fail "to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." MCL 445.903(1)(cc).

[10] We further note that the issue of whether the RISC was properly revoked, which Odom and Brown use to support their FCRA claim and to defend against FMCC's breach of contract claim, is not barred by collateral estoppel as the issue was not "actually and necessarily determined" in lawsuit one because that case was resolved by acceptance of case evaluation. See *Felsner v McDonald Rent-A-Car*, 193 Mich App 565, 569-570; 484 NW2d 408 (1992); *Rzepka v Michael*, 171 Mich App 748, 756; 431 NW2d 441 (1988).

> A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.
>
> (B) Reporting information after notice and confirmation of errors
>
> A person shall not furnish information relating to a consumer to any consumer reporting agency if--
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> (i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and
>
> (ii) the information is, in fact, inaccurate. [15 USC § 1681s-2(a)]

Here, FMCC reported Odom and Brown's unpaid RISC balance to credit reporting agencies. If the contract was properly revoked, Odom and Brown did not owe FMCC any money, and thus, FMCC's aforementioned actions violated the FCRA. 15 USC § 1681s-2(a). FMCC claims that the RISC was never revoked by its acceptance of the case evaluation award because it was never ordered that the RISC was revoked, and furthermore, even if the RISC could have been revoked pursuant to its acceptance of the case evaluation, Odom and Brown never properly revoked their acceptance because they never returned the vehicle. Odom and Brown respond by stating that they can revoke their acceptance without a judicial order stating that they did so, and furthermore, they were not required to return the vehicle in order to revoke their acceptance.

MCL 440.2608 provides that:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of the discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

The plain language of the UCC allows for the revocation of acceptance by simply having grounds to revoke the goods and by notifying the seller that acceptance of the goods is being revoked. MCL 440.2608. Whether or not Odom and Brown had grounds to revoke the RISC,

and whether they promptly notified FMCC of their intentions, have yet to be determined. The fact of the matter is there remain genuine issues of material fact regarding whether the RISC was revoked.

> Moreover, MCL 440.2602 further provides that, once a buyer has rejected goods:
>
> (a) . . . any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller
>
> (b) if the buyer has before rejection taken physical possession of goods . . . he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
>
> (c) the buyer has no further obligations with regard to goods rightfully rejected.

Here, FMCC contends that Odom and Brown have continued to use the vehicle, and furthermore, have refused to honor FMCC's requests to return the vehicle. Odom and Brown contend that they have not used the vehicle, and are only holding the vehicle until lawsuit one was complete. Therefore, even if there are no genuine issues of material fact regarding whether Odom and Brown had grounds to revoke the RISC and promptly notified FMCC of its intentions, there are still genuine issues of material fact regarding whether Odom and Brown *properly* revoked their acceptance. MCL 440.2602. Therefore, the trial court did not err when it denied FMCC's motion for summary disposition in regard to Odom and Brown's FCRA claim.

B. September 13, 2005, order

The trial court abused its discretion when it denied FMCC's motion to set aside the default. The resolution of claims upon their merits is preferred, and thus, the imposition of defaults and default judgments is not favored. *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 654; 649 NW2d 23 (2002). If a trial court chooses to enter a default judgment against a party, it must comport with the authority conferred by the court rules. *Kornak v Auto Club Insurance Association*, 211 Mich App 416, 420; 536 NW2d 553 (1995). Here, the record establishes that the trial court entered the default because of FMCC's failure to file an answer in response to Odom and Brown's counter-complaint. Under MCR 2.603(A),[11] a default must be entered against a party who fails to plead or "otherwise defend" as provided by the court rules. *Anspaugh v Imlay Township*, 273 Mich App 122; 729 NW2d 251 (2006).

Under MCR 2.108(A)(4), a "party served with a pleading stating a cross-claim or counterclaim against that party must serve and file an answer or take other action permitted by law or these rules within 21 days after service." When the counter-defendant files a motion for summary disposition, the 21-day period is tolled until the court rules on the party's motion.

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[11] MCR 1.105 provides that the court rules "are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties."

DeCaminada v Coopers & Lybrand, 232 Mich App 492, 495-496; 591 NW2d 364 (1998). Here, there is no dispute that FMCC inadvertently failed to file an answer to Odom and Brown's counter-complaint within 21 days after the trial court denied FMCC's motion for summary disposition on the counter-complaint. However, we find that FMCC "otherwise defended" against Odom and Brown's counter-complaint by presenting the same arguments in its motion for summary disposition on Odom and Brown's counter-complaint that it did in its eventual answer, by appearing at hearings, conducting discovery, and participating in case evaluation. In light of these facts, and given that resolution of claims upon their merits is generally preferred, we conclude that the trial court abused its discretion when it entered a default against FMCC. MCR 2.603(A); See also *Marposs Corp v Autocam Corp*, 183 Mich App 166, 169-170; 454 NW2d 194 (1990) (holding that where the defendant filed a motion for summary disposition regarding the plaintiff's complaint, but never filed an answer to the plaintiff's complaint either before or after its motion for summary disposition was denied, the trial court abused its discretion when it entered a default judgment against the defendant because the defendant did not fail "to 'otherwise defend,' as provided in MCR 2.603(A).")[12]

C. November 17, 2005, order

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[12] Even assuming that the trial court did not abuse its discretion when it entered the default against FMCC, it abused its discretion in refusing to set aside the default. When not based on a lack of jurisdiction over the defendant, a motion to set aside a default judgment will only be granted "if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1); *Anspaugh, supra*. Good cause sufficient to warrant setting aside a default or a default judgment may be shown by: (1) a substantial procedural defect or irregularity, or (2) a reasonable excuse for the failure to comply with requirements which created the default. *Saffian v Simmons*, 267 Mich App 297, 301-302; 704 NW2d 722 (2005). "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Waterbury Headers Corp, supra* at 233-234. The trial court found that FMCC had established a meritorious defense, but not good cause. We hold that FMCC did establish good cause, which because FMCC's meritorious defense to Odom and Brown's counter-complaint would be absolute if all the stated facts were established as being true, a lesser showing of "good cause" was required. *Waterbury Headers Corp, supra* at 233-234.

It is undisputed that FMCC's failure to file a timely formal answer was inadvertent, which is not the greatest excuse for failing to file a timely answer. See *Waterbury Headers Corp, supra* at 225. However, as previously discussed, given the reasons behind the court rules, the fact that imposition of defaults and default judgments is not favored, and the fact that FMCC's failure to timely file an answer did not in any way prejudice Odom and Brown, we find that FMCC's excuse of inadvertency was reasonable. Accordingly, we conclude that the trial court abused its discretion when it denied FMCC's motion to set aside the default against it. MCR 2.603(D)(1); *Anspaugh, supra*.

Because the trial court should have granted FMCC's motion for summary disposition in regard to Odom and Brown's MCPA claim, it likewise follows that the trial court erred when it awarded Odom and Brown attorney fees pursuant to the MCPA. Furthermore, the trial court's award of attorney fees pursuant to the FCRA was based on the jury verdict that FMCC violated the FCRA, which was based on a default judgment. In light of our conclusion that the trial court abused its discretion when it entered a default and subsequently denied FMCC's motion to set aside the default, it likewise follows that the trial court erred when it awarded Odom and Brown attorney fees pursuant to the FCRA.

Affirmed in part and reversed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray